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No. 82-2060

In the Supreme Court of the United States

OCTOBER TERM, 1983

FIDELITY CONSTRUCTION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether interest on amounts awarded by agency contract appeal boards under the Contract Disputes Act of 1978 runs only from the date the claim is properly certified under the Act rather than from the date an improper, uncertified claim is filed.

2. Whether the Equal Access to Justice Act authorizes the award of attorneys' fees by agency contract appeal boards established under the Contract Disputes Act of 1978.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 700 F.2d 1379.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1983. A petition for rehearing was denied on March 17, 1983 (Pet. App. B). The petition for a writ of certiorari was filed on June 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In April 1979, petitioner was awarded a contract by the Federal Aviation Administration to install an experimental runway lighting system at Bradley International Airport in Windsor Locks, Connecticut (Pet. App. A2). Petitioner and the FAA had several disputes during the performance of the contract. As a result, on October 26, 1979, petitioner filed a

25-item claim totalling $237,348.12 with the FAA's contracting officer (*ibid.*). This claim was revised on November 15, 1979, revised again on November 30, 1979, and revised a third time on January 23, 1980, at which time the claim stood at approximately $251,000 (*ibid.*). The FAA contracting officer found that petitioner had supported only $37,648.29 of the total amount of the claim, but he denied the claim in its entirety because he believed that fraud was involved in its submission (*ibid.*).

Petitioner appealed this decision to the Department of Transportation Board of Contract Appeals. At a pretrial conference, the Board advised both petitioner and the contracting officer that petitioner's various claims had not been submitted in compliance with the certification requirement of Section 6(c) of the Contract Disputes Act of 1978 ("CDA"), 41 U.S.C. (Supp. V) 605(c). That section requires a claimant seeking more than $50,000 to certify that:

> the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

None of petitioner's first three submissions had been certified.

On May 29, 1980, petitioner submitted its first certified claim, which totalled $257,066 (Pet. App. A3). Petitioner's appeal to the Board resulted in a final award of $320,773.04 "plus interest on hitherto unpaid amounts, computed * * * from the date of filing of the certified claim, May 19, 1980, until payment * * *" (*ibid.*).[1]

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[1]The May 19, 1980 date appears to have been a clerical error. Both petitioner and the government agree that the certified claim was filed on May 29, 1980 (Pet. App. A3 n.1).

On October 30, 1981, petitioner, in a motion for reconsideration to the Board, asked that interest be awarded from the date petitioner filed its first uncertified claim, October 26, 1979, rather than from the date of its first and only certified claim, May 29, 1980. Relying on the Equal Access to Justice Act ("EAJA"), petitioner also requested an award of attorneys' fees and expenses incurred during its litigation before the Board (Pet. App. A3).

The Board denied petitioner's claim for additional interest, stating that "interest does not run on a claim which is patently and grossly inaccurate * * * until such time as the claimant corrects the inaccuracies." *Fidelity Construction Co.*, 82-1 B.C.A. (CCH) para. 15,633, at 77,225 (1982). The Board found that such a qualifying claim had not been submitted until the certified claim was filed. *Id.* at 77,226. The Board denied attorneys' fees based on its conclusion that the EAJA does not authorize recovery of fees and expenses incurred prior to the October 1, 1981 effective date of the Act. *Id.* at 77,229.

The court of appeals affirmed the Board's rulings (Pet. App. A1-A20). On the question of interest, the court ruled that an uncertified claim for over $50,000 is a "legal nullity" under the CDA and that only a certified claim for such a sum could cause interest to accrue (Pet. App. A8). The court also ruled that the Board of Contract Appeals lacked jurisdiction to award attorneys' fees under the EAJA, whether incurred before or after October 1, 1981 (*id.* at A10).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any other judicial decision. Review by this Court is therefore unnecessary.

1. An allowance of interest on a claim against the United States, absent constitutional requirements, requires an explicit waiver of sovereign immunity by Congress. Such a waiver must be found either in a specific statutory provision or in an express contractual stipulation. *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 658-659 (1947).

Section 12 of the CDA, 41 U.S.C. (Supp. V) 611, provides for interest "from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof." Section 605(a) of Title 41 (Supp. V) requires all claims against the government to be submitted in writing to the contracting officer for a decision. The Court of Claims has ruled previously that "unless a claim has been properly certified, it cannot be considered under the statute," *Paul E. Lehman, Inc.* v. *United States*, 673 F.2d 352, 355 (1982), and that " 'to be valid a claim must be properly certified.' " *Ibid.*, citing *Folk Construction Co.* v. *United States*, No. 99-80C (Ct. Cl. Jan. 16, 1981). Unless that requirement is met and the claim has been properly submitted, the claim is invalid, and no "decision" is possible under 41 U.S.C. (Supp. V) 605(a). *Skelly & Loy* v. *United States*, 685 F.2d 414, 416 (Ct. Cl. 1982). If no decision is possible on the basis of the submission, then the provision for interest contained in 41 U.S.C. (Supp. V) 611 has not been triggered and interest cannot begin to accrue.[2]

Petitioner contends that the question whether interest accrues on an uncertified claim is "of exceptional importance" and is causing "confusion" for government contractors (Pet. 24). Any such confusion would be totally obviated

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[2]The fact that the contracting officer considered several of petitioner's uncertified claims is irrelevant because contracting officers have "no authority to waive a requirement that Congress imposed." *Paul E. Lehman, Inc.* v. *United States, supra*, 673 F.2d at 356.

if contractors simply certified all claims over $50,000, as required by law. There is thus no need for the Court to review this issue.

2. The court of appeals' determination that a board of contract appeals may not award attorneys' fees under the Equal Access to Justice Act is firmly based in the language of the statute itself. Attorneys' fees for non-judicial proceedings are governed by Section 203(a)(1) of the EAJA, 5 U.S.C. 504(a)(1). That Section permits attorneys' fees to be awarded only by "[a]n agency that conducts an adversary adjudication" (5 U.S.C. 504(a)(1)). "Adversary adjudication" is defined as "an adjudication under section 554 of this title" (5 U.S.C. 504(b)(1)(C)). Proceedings before boards of contract appeals, however, unquestionably are not adjudications under 5 U.S.C. 554. As explained in the Senate Report on the CDA (S. Rep. No. 95-1118, 95th Cong., 2d Sess. 15 (1978)):

> Agency boards of contract appeals * * * are not subject to the adjudication procedures of the Administrative Procedure Act (5 U.S.C. 554). This is plain from the text of section 5 of the act (5 U.S.C. 554) and the further explanation in the Senate Judiciary committee Print, June 1945, pages 21-22, where money claims are specifically excluded.

Because boards of contract appeals are thus not authorized to pay attorneys' fees under the EAJA, and because the EAJA is the only basis alleged by petitioner for an award of attorneys' fees, sovereign immunity must bar the award of such fees. See *Ruckelshaus* v. *Sierra Club*, No. 82-242 (July 1, 1983), slip op. 5; *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267-268 & n.42 (1975).

Section 204(a) of the EAJA, 28 U.S.C. (Supp. V) 2412(d)(3), clearly authorizes a court to award attorneys' fees and expenses to a prevailing party in an action for

judicial review of adversary adjudications under the CDA and further provides that the *court* may also award fees incurred during the earlier administrative adjudication. As the court of appeals correctly noted, however, this provision contains not the slightest suggestion that the boards themselves may award attorneys' fees incurred as a part of the administrative process (Pet. App.A12-A13). Waivers of sovereign immunity "cannot be implied but must be unequivocally expressed," *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *King*, 395 U.S. 1, 4 (1969), and therefore 28 U.S.C. (Supp. V) 2412(d)(3) cannot authorize payment of a fee award here.

Petitioner attempts to avoid the specific limitations of the EAJA by relying (Pet. 14) on Section 8(d) of the CDA, 41 U.S.C. (Supp. V) 607(d). That provision grants specified jurisdiction to boards of contract appeals "to decide any appeal" from certain decisions of contracting officers. It further provides that, "[i]n exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims."

Petitioner cites nothing, however, to suggest that Congress intended this provision of the CDA, written in 1978, to supersede by inference Congress' subsequent specific provisions for the award of attorneys' fees under the EAJA. Petitioner offers no support for defining "relief" in 41 U.S.C. (Supp. V) 607(d) to include attorneys' fees, which were not available in the Court of Claims in 1978.[3] Additionally, there is no indication in the CDA that the boards'

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[3]The term "Court of Claims" in Section 8(d) is also unclear in light of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. If that term is interpreted to refer to the new Claims Court, then petitioner's case is made even more difficult because it is not clear that the Claims Court has authority to award attorneys' fees (see Pet. App. A13-A14).

jurisdiction extends beyond deciding appeals from decisions of contracting officers to include ruling on issues such as attorneys' fee claims that were not raised before those officers. The court of appeals, by affirming the Board's denial of attorneys' fees, thus has given full effect to the language of the CDA without enlarging the specific legislative grant of authority in the EAJA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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